Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Comcast Corp.,	)	
Time Warner Cable Inc.,	)	
Charter Communications, Inc. and	)	MB Docket No. 14-57
SpinCo	)	
	)	
For Consent to Transfer Control	)	
of Licenses and Authorizations	)	

REPLY OF

wave

WAVEDIVISION HOLDINGS, LLC

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EXECUTIVE SUMMARY

Comcast and other commenters make much of how to define competition under various antitrust and economic theories. But competition is not theoretical to consumers. It is real. Its benefits are liberating. Its absence is smothering. The customers of WaveDivision Holdings, LLC ("Wave") where Wave directly competes with Comcast know what competition is and that it provides very real, tangible benefits.

Over the past decade, Wave has built a highly successful consumer-oriented business, about one-fifth of which operate in head-to-head competition with Comcast. Thus, Wave's comments are not based on hypothetical econometric analyses. They are based on very real experience providing a highly successful top-rated consumer service as measured by Consumers Union and the fastest regional broadband service according to PC Magazine.

Consumers benefit from robust competition. History has borne out that competition is better than any form of regulation, including merger conditions. Yet, Comcast's significantly lower programming costs makes competition with Comcast for the provision of multi-channel video service difficult to the point where Wave's operates at a very low video margin. Wave continues to offer video services so that consumers have a full triple-play alternative to Comcast. Yet even a small incremental advantage in programming cost to Comcast resulting from the merger may push Comcast's programming cost advantage to the point that to compete with Comcast's video offering, competitors such as Wave would have to provide it at a loss.

Comcast readily admits that it will benefit from lower total programming costs and a greater number of subscribers as a result of the transaction. It deflects the reality of the situation by calling such programming cost savings "modest." Given that Comcast will take in about as much money in a day that Wave takes in during an entire year, "modest" is, in fact, very relative. The cost savings admitted to by Comcast could equal several dollars per subscriber per month just in initial programming cost savings. And that is just the beginning.

Programmers cannot survive without the existing revenue streams from Time Warner. Accordingly, Comcast's savings will need to be made up from the remaining base of smaller, independent operators. Because that pool is only about nine million subscribers (the providers for which are mostly represented by the National Cable Television Cooperative), and the pool of Time Warner Cable subscribers is larger (about 11.3 million), for each dollar of revenue lost by programmers, the programmers must recover $1.27 from the remaining smaller independent operators.

Going forward, Comcast will be able to extract further price concessions from programmers, and that will continue to drive up costs for independent operators, including Wave, and increase the differential – aka competitive price advantage – even larger, converting the provision of terrestrial-based multi-channel video programming from a low-to-zero margin to a negative margin business. If this happens, long-term competition for video services will be crippled and consumers will be captive to Comcast's pricing and potentially restrictive terms and conditions.

Interestingly, Comcast takes credit today for having made it possible for start-up minority and specialty programmers to launch because carriage by a platform the size of Comcast's made it economically feasible. Thus, Comcast believes it played an important part in creating today's "Golden Age" of television. Yet, Comcast also assures the Commission that its post-merger much larger subscriber base (*i.e.*, platform) will not be sufficient to influence programming services and programmer pricing. Comcast can't have it both ways. It spoke the truth when it claimed credit for being able to make programming markets. In effect, Comcast is the dictator of today's programming market – and not a benevolent one at that. The future of *de facto* totalitarian control over the availability, rates, terms and conditions of programming is simply not good for consumers.

The only way to back the competitive landscape away from this tipping point is for the Commission to exert its authority – authority that it plainly has been given by Congress – authority that has been affirmed by the courts – to level the rates, terms and conditions that terrestrial facilities-based competitors of video service must pay to those paid by Comcast.

Congress gave the Commission two bases of authority to regulate programming agreements. The first applies to programmers who are vertically integrated with cable operators. The second applies to all programmers, regardless of ownership. Both statutes are broadly written. Both have the same type of structure as other parts of the Cable Consumer Protection and Competition Act of 1992 that have been interpreted by the courts to give the Commission wide discretion to protect competition.

Plainly, the Commission has the authority. Wave understands the Commission's historic reluctance to become involved in any content price-setting. But that is not the merger condition that Wave suggests. Rather, Wave seeks a simple mandate that all programming providers, regardless of transmission technology (*i.e.*, satellite, terrestrial or broadcast), must provide the same rates, terms and conditions computed on a per subscriber basis to terrestrial facilities-based competitors to Comcast that are provided to Comcast. This can be done by requiring uniform pricing for Comcast's facilities-based competitors. This mandate will simply cause market forces to re-level programming rates, terms and conditions.

The merger is hailed by Comcast as providing many benefits for its customers. The Commission, however, must make sure the merger is in the interest of *all* consumers. The single most effective measure to protect the public interest is the existence of vibrant, robust competition. Wave has built a business from scratch that in part offers consumers in some of Comcast's markets a choice – the ability to select Wave's competitively priced top-rated service over Comcast's bottom-rated service. Whether consumers will have that choice for video service going forward is dependent on the Commission. Failure to adopt Wave's proposal will allow Comcast to obtain a size and scale that will push the ability for anyone to compete against its video service beyond the tipping point.

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WAVEDIVISION HOLDINGS, LLC

I. Introduction

WaveDivision Holdings, LLC ("Wave") was founded in 2003 with a vision of providing consumers with a high quality alternative for cable, broadband and phone services. In about one-fifth of its markets, this meant building a business in the shadow of the dominant local provider – Comcast.

Wave's focus on quality and customer service has paid off. Today, its service is top-rated by Consumer Reports and #1 on PC Magazine's 2014 list of Fastest ISPs.[1] Branded "Wave Broadband" and "Astound Broadband," Wave has earned more than 143,000 video customers. Although that number may seem significant, it means that Wave serves less than one

[1] Consumer Report, March 2014 where Wave's service was rated second highest for Internet and fourth highest for television. In 2014, PC Magazine rated Wave's broadband service the fastest in the Northwest United States, faster than Comcast's (Eric Griffith, *The Fastest ISPs of 2014*, PC Magazine, September 4, 2014) Wave was also named the "Independent Operator of the Year" in 2012 by CableFAX magazine.

half of one percent of the number of customers that Comcast will serve after the merger. And Wave does not own a major television network, major-market television stations, numerous cable channels or a movie studio. Wave is financially successful and strong. Yet it is miniscule in financial terms to Comcast. Today, Comcast takes in considerably more revenue in two days than Wave does in an entire year.[2] After the merger, Comcast likely will take in almost as much money in one day as Wave does in an entire year.

Not only does Comcast have vastly more money coming in the door, but it also has significant cost advantages in the provision of video service – resulting in higher margins that can be used to squash video competition. As discussed in these comments, Comcast procures critical inputs, most importantly programming, at vastly lower costs than Wave. In order for Wave to continue offering consumers a full triple-play line-up of offerings, Wave may be forced to offer video services at negative margins just to match Comcast's retail price offerings – prices at which Comcast has a significant positive margin. Visioning long-term sustainable video competition against the post-merger Comcast is almost impossible, absent meaningful merger conditions.

II. Competition is Local

The record is consumed with dueling expert reports over whether relevant geographic markets for broadband and video are national or regional on the one hand or local on the other.[3] In order to avoid meaningful scrutiny of the impact of the merger on competition, Comcast

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[2] Comcast Corporation 10-K, reporting 2013 revenues of $65.7 billion (page 81).
[3] *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Transfer Control of Licenses and Authorizations*, Applicants' Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (filed September 23, 2014) ("Comcast Comments")

asserts that the measure of impact on competition is local.[4] Its expert, Dr. Israel, claims that because Comcast and TWC do not serve the same geographic footprints, there is no impact on competition.[5] Dr. Israel then makes the phenomenally broad assertion that "Put simply, the transaction will not change the number of broadband choices available to consumers."

Keeping it simple and out of the antitrust "relevant market" fray, for purposes of Wave's comments, Wave concedes that Comcast has it right – competition is local. Wave's battle against Comcast, is very local. It is customer-by-customer, house-by-house, playing out every day in the streets of communities in their overlapping service areas. But Comcast pretends that its competition with Wave and other similarly situated smaller providers that dare compete with Comcast is not relevant to the Commission's determination as to whether or not the merger is in the public interest.[6] Nothing could be further from the truth. Ask the consumers in Wave's Comcast-served markets.

Furthermore, Dr. Israel's assertion that the merger will not change the number of choices available to consumers is short-sighted. Perhaps that will be true when the sun rises the day after the merger, however, given time, the inevitable harm to competition may cause some video competitors to give up because Comcast will, as discussed in these comments, have an insurmountable cost advantage resulting from its vast economic power and control over programming. It will certainly become difficult for new video competitors to enter the market and for existing video competitors to continue to provide negative margin services.

[4] Comcast Comments at p. 116 (with respect to broadband – pull similar analysis for video).
[5] *Id.*
[6] Although Wave acknowledges that antitrust analyses are important in determining what is and is not in the public interest, the Commission's standard is not limited to antitrust analysis. Plainly, the increased financial power and ability to obtain critical inputs on vastly more favorable rates, terms and conditions will seriously impede Wave's ability to meaningfully compete for video customers post-merger. This impact on consumers in the local markets served by Wave is a valid public interest consideration.

The Commission cannot be distracted by Comcast's effort to divert attention to the question of whether competition in the former Time Warner Cable or Charter markets will suffer.[7] While this may be a valid consideration, it is not the *sole* competitive – public interest - consideration presented by the merger. The Commission must also consider the impact of the merger on competition in all markets in which local terrestrial providers compete head-to-head with Comcast today or with the new Comcast tomorrow.[8] Wave competes with Comcast today and will after the merger.

III. The Transaction will Create Greater Competitive Advantage for Comcast – Both Immediately and Over Time.

A. Comcast deflects attention from its already huge programming cost advantage; an advantage that is very relevant to the Commission's review.

Comcast employs two fictions to deflect Commission attention from that fact that it pays much less for programming than its competitors and the fact that this differential will grow as a direct result of the merger:

[7] Comcast Comments at 144 ("Applicants have demonstrated that the Transaction presents no horizontal competitive concerns because neither TWC nor Charter currently constrains Comcast as a competitor or potential competitor in the relevant market.") and at 145 ("The Transaction thus clearly has no impact on the local retail broadband market. . . ."). Comcast Comments at 176 ("Comcast and TWC serve distinct markets; therefore, they do not compete for MVPD subscribers and no consumer will have fewer MVPD choices post-transaction.

[8] Comcast essentially maintains that terrestrial competitors are not important as long as satellite competitors exist. Comcast makes much of the fact that 98% of MPVD customers have access to at least three MPVDs. But only 35% of homes have access to four or more. Thus, 63% of MVPD customers have only the choice of one terrestrial and two satellite providers. See Comcast Comments at fn 548.

1. **Fiction 1 – The relevant programming cost comparison is between Comcast and Time Warner Cable.**

Comcast focuses much attention on the fact that the programming cost differentials between Comcast and Time Warner are not that significant.[9] When examining local terrestrial competition, such as Wave provides, the relative programming costs of Comcast *vis a vis* Time Warner, or even if extended to a large satellite MPVD such as DirecTV is simply irrelevant.

2. **Fiction 2 – Comcast's programming cost advantage is "flattening out."**

Comcast's experts offer the somewhat fantastical assertion that "major price differentials appear to be flattening out" "between smaller MVPDs and MVPDs the size of TWC, DirecTV or Comcast."[10] The nakedness of this assertion and its disjointedness from the context in which presented betrays the fact that it is totally unsupported by the evidence in the record or by reality.[11] Comcast offers nothing more than a bald assertion. The Comcast Comments jump from comparisons of programming cost advantages between Comcast and Time Warner Cable to a claim the huge programming cost advantage that Comcast enjoys over smaller video competitors such as Wave is going away.

Instead of supporting its "flattening out" assertion, Comcast offers only conjecture that "it would not be advisable for a programmer to create too much differential between one MVPD's prices and another's in the same market."[12] Concluding from this conjecture, Comcast

[9] Comcast Comments at 157 ("this still implies that the 'difference in average affiliate fee rates between Comcast and TWC is very small on a per customer per month per network basis.'").
[10] Comcast Comments at 158.
[11] This assertion tags on to the end of the analysis attempting to support the claim that programming costs between Comcast and TWC are not materially different and is not supported by any footnote or other authoritative reference.
[12] Comcast Comments at 158 ("And this makes sense. In today's highly competitive MVPD market, where switching is increasingly easy, it would not be advisable for a programmer to create too much differential between one MVPD's prices and another's in the same market, since that could drive subscribers to switch to the MVPD with lower wholesale pricing (and result in less revenue for the programmer), all else being equal.") Wave agrees

states that "[t]hus there is no basis to claims that small MVPDs [] are at a particular disadvantage with respect to programming costs and are uniquely vulnerable to competitive harm."[13] Comcast asks the Commission to ignore the fact that smaller video competitors such as Wave today pay substantially more for programming than Comcast as merely a "competitive disadvantage" that is "not transaction-related and should not be considered in this proceeding."[14] As demonstrated in these comments, the "competitive disadvantage" that Comcast acknowledges exists today is very relevant to the Commission's analysis of the merger because the merger may well take that advantage beyond the tipping point.

Contrary to Comcast's claim, Wave has not experienced any "flattening out" of Comcast's huge programming cost advantage. Tellingly, the evidence in the Comcast Comments support's Wave's observation. Comcast claims that its "programming costs have risen by more than 10 percent annually, on average, over the past 10 years…."[15] Wave's programming costs have risen by well more than 10 percent annually, on average over the past 10 years. Thus, all things equal, there has been no "flattening out" of Comcast's cost advantage. But all things are not equal. Wave believes that it pays at least twenty to thirty percent more, on average, for satellite programming, and up to two times more for retransmission consent, than Comcast. Thus, even applying the same percentage to the two different cost bases means that Wave's programming costs measured on a per subscriber basis have increased dramatically more in terms of dollars than Comcast's. Comcast's programming cost advantage has grown; the gap has increased, not flattened.

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that this core economic principle should apply but programmer providers cannot avoid a big differential between the largest MVPDs and all others because of Comcast's ability today to distort marketplace forces.

[13] Comcast Comments at fn 490.

[14] Comcast Comments at fn 490.

[15] Comcast Comments at 157.

Robust competition requires video competitors to offer not just a high-quality customer experience, but also a competitive price. As Wave's wholesale cost of programming has increased, those costs have to be passed on to customers. Thus, not only does the programming cost differential harm competition, those differentials are ultimately paid for by consumers. Competitive providers can absorb only so much of the ever increasing differentials that drive up their costs. This is not theoretical as evidenced by huge consumer price increases announced by Wide Open West (WOW!) another competitive provider. WOW!, another top consumer-rated facilities-based provider of competitive triple-play services recently announced that it would lay off nine percent of its workforce and increase subscriber rates by $15 per month or more to "more effectively compete."[16] Importantly, $8 of this increase is directly attributable to programming costs.[17] This drastic change in course for a provider situated in many ways similar to Wave shows the reality of the competitive landscape and the burdens of the programming cost disparities.

B. Comcast's programming cost advantage will grow on the day after the merger.

Following the initial comments by both competing and non-competing MVPDs that the merger would give Comcast even greater programming cost advantages, Comcast now changes its tune and attempts to distance itself from initial public proclamations. In its Public Interest Statement, Comcast projected savings of $1.5 billion over the first three years post-merger, in part from migration of TWC subscribers to Comcast programming contracts that have "more

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[16] Daniel Frankel, *WOW! Announces company-wide layoffs, price increases for customers,* FierceCable (December 4, 2014) http://www.fiercecable.com/story/wow-announces-company-wide-layoffs-price-increases-customers/2014-12-04.

[17] *Id.* (noting that $5 broadcast fee, $2 sports surcharge and $1 local programming fee).

favorable rates and terms."[18] Yet now Comcast downplays any programming savings as "modest."[19]

"Modest" is a relative term. A "modest" cost reduction for Comcast may result in cost shifting to Comcast's competitors, including Wave, that bears little resemblance to anything "modest." Comcast takes pains to avoid quantifying "modest." For example, when dealing with the fact that Comcast enjoys lower programming costs than Time Warner Cable, Comcast points to an expert analysis that "*implies* that the 'difference in average affiliate fee rates between Comcast and TWC is very small on a per customer per month per network basis.'"[20] Comcast remains unwilling to quantify these differences.

Dissembling Comcast's qualifiers to a "very small" cost advantage reveals that, in the aggregate, the difference may not be very small at all. Comcast measures the difference in programming cost on a monthly *per subscriber, per network basis*.[21] Comcast claims to offer about 300 channels in its digital service.[22] Generally, each is a separate network, although even assuming that only 60% are unique networks to account for redundant standard and high definition feeds, this means that Comcast is carrying approximately 180 unique networks on digital.[23] So even if Time Warner Cable only paid 2 cents per month on average more than Comcast, that's a $3.60 per subscriber monthly cost savings. Make it only 5 cents (on average)

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[18] *See* TWC/Comcast Public Interest Statement, Exhibit 4, Declaration of Michael J. Angelakis, Vice Chairman and Chief Financial Officer, Comcast Corp., at 7(c). (discussing operating expense efficiencies that "are expected to come from savings on programming costs over a three-year period, to the extent and at such time as more favorable rates and terms in some of Comcast' s programming agreements supersede some of TWC' s existing contracts.")
[19] Comcast Comments at 157-158.
[20] Comcast Comments at 157 (emphasis added).
[21] Moreover, the term "average" also conceals the fact that Comcast may have significant cost advantages for certain marquis programming that gives it additional competitive advantages.
[22] Comcast 2014 10-K at 4.
[23] Computed as 300 channels multiplied by 60% non-duplication. A sampling of actual channel line-ups at http://www.comcast.com/customers/clu/channellineup.ashx shows minimum of "180+" channels with many tested addresses showing line-ups with channel counts throughout the 200 channel range.

and it is $9.00 – 10 cents yields a $18 per subscriber monthly cost savings. The Commission can do the arithmetic. The numbers add up quickly into a huge competitive advantage – whether $5 per month or more ***of new savings*** it all helps Comcast gain yet another significant advantage over competitors.

Describing this piling of yet another tool to crush video competition as an “advantage” likely does not do justice to the harm this transaction will ultimately inflict on consumers. Today, the differential in programming costs is such that Wave’s margin on video programming is very low. After the transaction, to continue providing a competing linear video product will likely require Wave to incur near zero or potentially negative margins. Negative margins will make long-term, vibrant competition for video impossible. It is consumers who are hurt if they are hostage to Comcast as a sole provider of video service.

Because of confidentiality restrictions imposed by programmers, only the Commission has the ability to determine with precision the amount of the programming cost advantage that Comcast has over competing video providers. The Commission should require production of programming rates, terms and conditions (including all tie-ins) to determine the actual net effective per subscriber cost of programming to Comcast and to other smaller MVPDs, including those that compete such as Wave.[24] A large amount of data for smaller MVPDs could be provided by the National Cable Television Cooperative. Wave strongly encourages that the Commission require production of this information in conjunction with this proceeding.

[24] It is critical that the Commission look at all rates, terms and conditions to determine the true net cost to Comcast of programming (offsetting all benefits that programmers provide Comcast that reduces its total cost).

The merger will result in at least $1.5 billion in annual cost savings to Comcast after the third year.[25] Included in this cost savings are programming costs "to the extent and at such time as more favorable rates and terms in some of Comcast's programming agreements supersede some of TWC's existing contracts."[26] Importantly, the reduced programming costs do not go away. Programmers will not voluntarily forego revenue; rather they will shift the costs to smaller MVPDs and their customers.[27] Time Warner Cable reports about 11.4 million subscribers but there are not that many smaller MVPDs subscribers remaining so a dollar per subscriber shifted from the post-merger Comcast will result in more than a dollar per subscriber increase to smaller MVPDs. Most independent MVPDs are represented through master agreements through the National Cable Television Cooperative, Inc. ("NCTC"). Given that the four largest NCTC members do not regularly participate in NCTC master agreements, that leaves about nine million that do.[28] So, for example, a $5 programming cost savings per Time Warner Cable subscriber by Comcast would result in a $6.33 increase in per subscriber programming cost to competing, smaller MVPDs.

This cost shifting cannot be viewed in isolation, but must be viewed in the totality of events reshaping the multi-channel video programming marketplace. Other consolidation will only increase the costs of smaller MVPDs, making competition with Comcast that much more difficult, if not impossible.[29] Even a company with the immense financial resources of AT&T,

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[25] *See* TWC/Comcast Public Interest Statement, Exhibit 4, Declaration of Michael J. Angelakis, Vice Chairman and Chief Financial Officer, Comcast Corp., ("TWC/Comcast Public Interest Statement") at 3.
[26] TWC/Comcast Public Interest Statement at 7(b).
[27] Comments of American Cable Association in MB Docket No. 14-57 (filed August 25, 2014) ("ACA Comments") at 28.
[28] ACA Comments, Exhibit B, Declaration of Rich Fickle ("Fickle Declaration"), at ¶6.
[29] As AT&T re-rates its subscribers to the DirecTV rate, that also will cause increased costs to smaller MVPDs. As other much anticipated follow-on acquisitions occur, especially if Charter Communications is used as a roll-up vehicle, programming cost savings achieved by Charter will also will be shifted to smaller MVPDs.

with six million subscribers, determined that it could not compete with "Comcast and Time Warner Cable, its principal competitors."[30] Why not? High programming costs. AT&T admitted to the Commission that "[l]ack of scale particularly hinders AT&T with respect to content acquisition, which is by far the largest variable cost of MVPD service. AT&T therefore faces challenges selling competitive broadband/video bundles even inside its U-verse video footprint." AT&T's Chief Strategy Officer more bluntly stated that: "We've paid daily through the nose to grow that business and we want to now get ourselves into a position where we're paying what we consider to be competitive economic cost for content to stay in that business."[31] Yet the "*re-rating* [the 6 million AT&T subscribers] *to the DirecTV base*" will cause even higher programming rates for independent and competitive MVPDs such as Wave.[32] The Commission does not need fancy econometric studies to understand that a competitive MVPD with a wholesale programming cost structure twenty to thirty percent higher than Comcast cannot effectively compete even if it charges customers only its wholesale cost.

C. Comcast's programming cost advantage will grow over time.

Following the immediate hit from the merger, it is absolutely inevitable that Comcast's programming cost advantage will only continue to grow. At the closing of the merger, Comcast will represent about 30 percent of the nation's video subscribers.[33] Comcast maintains that its size will help the video programming marketplace by making its platform available to even more

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[30] AT&T Public Interest Statement at 3.
[31] Remarks of John Stankey, Group President and Chief Strategy Officer, AT&T Inc., Bank of America Merrill Lynch Media, Communications and Entertainment Conference (Sept. 16, 2014).
[32] Comcast Comments at fn 488 citing remarks of John Stankey, Group President and Chief Strategy Officer, AT&T Inc., Bank of America (emphasis in original). Merrill Lynch Media, Communications and Entertainment Conference (Sept. 16, 2014).
[33] Comcast Comments at fn 479.

programmers.[34] In fact, Comcast argues that its current size has "helped facilitate" the current "Golden Age" of television.[35]

Comcast can't have it both ways. Comcast simply cannot assert that it will have no ability to influence the programming marketplace adversely after the merger but in its smaller incarnation today, claim that it has played a major role in developing the marketplace as it exists. Influence is influence.

The new and bigger Comcast will be able to negotiate even lower rates from programmers – costs that will be shifted to the customers of Wave and other smaller MVPDs. Rather than repeat the analysis here, Wave refers the Commission to the comments of the American Cable Association filed on August 25, 2014, in particular pages 25-27 and Exhibits A and B. The dangers are real and the harm to video competition and consumers significant.

Wave has focused its comments to the ability of the facilities-based post-merger Comcast to extract extraordinary programming cost concessions. But the reality remains that not only will these concessions make it possible for Comcast to squash head-to-head video facilities-based competition, but it will also facilitate Comcast's inevitable entry as an over-the-top non-facilities based provider of multichannel video programming services. As a virtual MSO, Comcast can further leverage its programming cost advantage in areas out of its franchised markets. This immense cost advantage alone grants Comcast almost certain dominance over that marketplace, effectively creating a barrier to meaningful competitive entry.

[34] Comcast Comments at fn 479.
[35] Comcast Comments at fn 479.

IV. The Commission Must Eliminate Programming Cost Advantages.

The marketplace for programming is broken and it is about to become even more so. To compete with Comcast, an independent terrestrial MVPD must pay substantially more for programming than what Comcast pays.[36] As explained above, that disparity will grow beginning on the day after the merger closes.[37] The unknown is exactly where the tipping point lies, that once reached means that local MVPD competitors will no longer be able to compete with Comcast for the provision of video service. Because once competitive MVPDs are smothered, local video competition cannot be restarted, the Commission must use caution.

The irreparable harm to the video programming marketplace from this merger requires that the Commission step in to effectuate the "flattening out" of the cost disparity that Comcast claimed was already happening. The only way that this can happen is for the Commission to require that all providers of video programming services offer the same rates, terms and conditions they afford Comcast to any terrestrial video competitor of Comcast.[38] Mandating this offering is no different than when Congress required incumbent local exchange carriers to offer interconnection, services and network elements on the same terms and conditions provided to any other telecommunications carriers – with the goal of fostering competition.[39] This simple remedy will achieve the goal of fostering vibrant competition to Comcast and providing a meaningful market-based incentive for programmers to not have the effect of harming competition by shifting costs for Comcast programming onto the consumers of competitors. Further, to prevent Comcast from effectively aborting any competition in the soon-to-come

[36] Fickle Declaration at ¶8.
[37] *Id.*at ¶7.
[38] Rates, terms and conditions would all have to be scaled so as to be measureable on a per-subscriber basis, something done routinely in the industry.
[39] 47 U.S.C. §252(i).

virtual MSO marketplace, the Commission must require Comcast to offer its virtual MVPD service to its competitors such as Wave on a wholesale basis at a cost sufficiently below Comcast's lowest retail price to permit commercially reasonable reseller mark-up.

A. Comcast owned or controlled programming would require additional restrictions.

The Commission's ability to regulate the rates, terms and conditions of Comcast owned or controlled programming in the public interest is without question. The Commission should prohibit any artificial inflation of the transfer prices of programming within the Comcast family or sphere-of-influence. To backstop this prohibition, the Commission should also require that the referenced maximum rates, terms and conditions cannot exceed those charged to any unaffiliated third-party programmer such as, without limitation, DirecTV or Charter.

B. The Commission has the clear authority to regulate the rates, terms and conditions of those program providers vertically integrated with a cable operator.

As part of the 1992 Cable Act, Congress mandated that the Commission adopt regulations to "promote the public interest convenience and necessity by increasing competition and diversity in the multichannel video programming market. . ." by prohibiting[40] "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[41] Congress gave the Commission a broad grant of authority under Section 548(b), which is not limited by the enumerated "minimum contents of regulations" listed in Section 548(c)(2).

[40] 47 U.S.C. § 548(c)(1).
[41] 47 U.S.C. § 548(b).

The courts have confirmed that the Commission has broad authority under Section 548(b). For example, the United States Court of Appeals for the District of Columbia held that the Commission could prohibit a cable operator from entering into exclusive service arrangements with multiple dwelling unit owners.[42] The Commission also used this section to justify the extension of the statutory ban on exclusive satellite cable programming agreements to terrestrial programming, which the D.C. Circuit upheld under the theory that Section 548(b) was a "clear repository of Commission jurisdiction to adopt additional rules and take additional actions."[43]

Thus, the Commission has clear authority to mandate non-discriminatory pricing between local terrestrially-based MVPD competitors by programmers vertically integrated with a cable operator.

C. The Commission has authority to regulate all rates, terms and conditions of programming agreements, not just those of vertically integrated programmers.

In addition to the ability to regulate the conduct of programmers vertically integrated with a cable operator under Section 548, Congress also gave the Commission express authority to establish regulations "governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." under Section 536.[44] As with the structure of Section 548, Section 536 provided a list of mandatory practices to be covered by Commission regulations.

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[42] *National Cable Telecommunications Ass 'n v. FCC*, 567 F. 3d 659 (D.C. Cir. 2009) (*"NCTA"*).
[43] *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695 at 701 (D.C. Cir. 2011) *("Cablevision")*.
[44] 47 U.S.C. § 536(a).

The Commission's authority under Section 536 can be read broadly[45] and should not be limited to a list of mandatory regulatory elements that includes only restrictions on the conduct of MVPDs. Despite the absence of cases interpreting the scope of Section 536, its structure is virtually identical to that of Section 548 and therefore should be interpreted similarly[46]

The statutory construction analyses applied by the Court in *NCTA* and *Cablevision* would apply equally to Section 536. In both cases, the Court held that "Congress's enumeration of specific, required regulations in subsection (c) actually suggest that Congress intended subsection (b)'s generic language to cover a broader field."[47] Furthermore, the Court rejected the argument in *Cablevision* that "by leaving terrestrial programmers off the list of entities covered by Section [548](b), Congress unambiguously placed terrestrially delivered programming beyond Commission jurisdiction."[48] The Court continued that "Section [548]'s expansive language suggests that it intended to give the Commission sufficient flexibility 'to maintain. . . a grip on the dynamic aspects of [video programming]' so that it could pursue the statute's objectives as industry technology evolves. . . . [citations omitted.] [Moreover,] [w]hen Congress delegates broad authority to an agency to achieve a particular objective, agency action pursuant to that delegated authority may extend beyond the specific manifestations of the problem that prompted Congress to legislate in the first place."[49]

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[45] The legislative history supports this broad grant of authority with no stated restrictions ("Section 11 amends the Communications Act by adding a new Section 616 [47 U.S.C. § 536] which requires the FCC to establish regulations governing program carriage agreements and related practices between multichannel video programming distributors and video programming."). H.R. Rep. No. 102-628, at 81 (1992).

[46] Each has a grant of general authority (Section 536(a)(1) and Section 548(a)), a requirement that regulations be enacted and a list of minimum elements to be included in the regulations (Section 536(a)(3)-(5) and Section 548(c)(2)(A)-(C)).

[47] *Cablevision* at 705, citing *NCTA* at 664-65.

[48] *Id.* at 707.

[49] *Id.*

One could argue that the difference between programmers who are vertically integrated and those who are not is similar to the difference between satellite and terrestrially-delivered programming. In that case, the Court concluded that:

> It does not follow, however, that just because Congress required mandatory minimum regulations for some technologies, it intended to exclude other technologies from regulation. Hardly clairvoyant, especially with respect to rapidly evolving technologies, Congress may well have targeted satellite programming in section 628(c)(2) simply because it was at the time far and away the dominant form of video programming and thus the focus of concerns about anticompetitive withholding.

When the 1992 Cable Act was passed, Congress conferred on the Commission unrestricted ability to regulate MVPD/programmer agreements but was obviously concerned mostly about MVPD abuse of programmers. Today, the economics have changed and the proposed merger will further reshape that landscape. The use of this authority by the Commission to eliminate discrimination between local terrestrially-based competitors falls squarely within the pro-competition policies articulated by Congress when it passed the 1992 Cable Act.[50]

V. Conclusion

Robust and vibrant competition is the best regulator to assure consumers have the best and most advanced service possible at the lowest cost possible and that is the epitome of serving the public interest. The ability of continued video competition in Comcast markets is at the tipping point and the merged Comcast will push it past. Wave respectfully requests that the Commission adopt the simple market-leveling mandate, no matter what mechanism, that will let

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[50] H.R. Rep. No. 102-628 at 27, *reprinted in* 1992 U.S.C.C.A.N. 1133 ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services").

the market for programming continue to function and foster continued and increased competition in the future.

Respectfully submitted,

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